

LESLIE E. DEVANEY  
ANITA M. NOONE  
LESLIE J. GIRARD  
SUSAN M. HEATH  
GAEL B. STRACK  
ASSISTANT CITY ATTORNEYS

LISA A. FOSTER  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

**Casey Gwinn**  
CITY ATTORNEY

CIVIL DIVISION  
1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4199  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

**MEMORANDUM OF LAW**

**DATE:** October 12, 2000

**TO:** Joe Ross, Chief of Policy, Council District No. 5

**FROM:** City Attorney

**SUBJECT:** Potential Conflict of Interest Arising from Councilmember's Board Position with NTC Cultural Foundation/Item No. 334, Council Docket of October 3, 2000

You have asked whether Councilmember Blair has a potential conflict of interest which disqualifies him from participating in discussions in and voting on an item pertaining to Naval Training Center [NTC] Reuse Plan, which is on the City Council docket of October 3, 2000, as Item No. 334. The question arises because Councilmember Blair serves as the Vice Chair of the NTC Cultural Foundation, a nonprofit entity involved in decisions regarding development of portions of the Re-Use Plan.

**QUESTION PRESENTED**

Is Councilmember Blair disqualified from participating in discussions and voting on Item 334 on the October 3, 2000 Council docket, based on his position as Vice Chair of the NTC Cultural Foundation?

**SHORT ANSWER**

No. Councilmember Blair is not prohibited from participating in the discussions and voting on Item 334, related to the NTC Reuse Plan, because he has no economic interest that would be affected by the City Council's decisions on the project.

## BACKGROUND

NTC is a 360-acre site located along Rosecrans Avenue west of the Lindbergh Field Airport. The site is in the Peninsula Community Planning Area, on property which is currently not zoned. Because NTC has ceased being used for military purposes, the City Council has approved an NTC Redevelopment Project Area, and an NTC Reuse Plan. The Reuse Plan divides the site into five types of use: Residential, Educational, Historic Core/Mixed Use, Waterfront/Recreation, and Camp Nimitz. The Navy has approved the plan, and is conveying portions of the site property to the City for the project.

As part of Item 334 on the City Council docket of October 3, 2000, the City Council will be making a number of decisions related to the NTC Reuse project. These decisions include: adoption of amendments to the Peninsula Community Plan; granting or denying a Vesting Tentative Map; granting or denying the NTC Master Development Permit/Coastal Development Permit; granting or denying a conditional use permit for a golf course; granting or denying a permit allowing Metropolitan Wastewater to put a Wastewater Lab on the site; various environmental findings necessary for the project; and zoning decisions for the site, which is currently not zoned.

Councilmember Blair is Vice Chair of the board for the NTC Cultural Foundation [Foundation], a recently created nonprofit entity whose members were chosen by a consultant working for the NTC Reuse project's developer, McMillan. The Foundation has been given responsibility for making decisions regarding the development of the Historic Core portion of NTC, which will house nonprofit agencies, artist studios, retail art shops, and performance spaces. The Vice Chair position is an unpaid position. Councilmember Blair has not received any reportable income or gifts from the Foundation or the project's developer in the last twelve months.

## ANALYSIS

### I. Political Reform Act of 1974

This matter is governed by the Political Reform Act of 1974 [Act], which is codified at California Government Code sections 81000-91015. The Act was adopted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. Cal. Gov't Code § 81001.

A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member or his or her immediate family, or on any of six economic interests delineated in California Government Code section 87103. Those six interests are investments in

business entities; interests in real property, income received in the previous twelve months, positions in business entities, and gifts received in the previous twelve months. Investments, income and gifts must meet threshold dollar values set by the Act before they become potential sources of disqualification. Cal. Gov't Code § 87103.

The Councilmember is a public official within the meaning of the Act, and the action items under Item 334 on the October 3, 2000 docket are all governmental decisions within the meaning of the Act. However, from the facts provided, it does not appear that Councilmember Blair has any financial interests which would be affected by the decisions on Item 334.

The term "business entity" is defined as an organization or enterprise operated for profit. Cal. Gov't Code § 82005. A nonprofit entity, such as the Foundation, is not considered a business entity under the Act. Therefore, the position of Vice Chair of the Foundation is not a "position in a business entity" for purposes of the Act. Further, Councilmember Blair does not receive compensation as Vice Chair of the Foundation, and the Foundation has not been a source of gifts to him. Therefore, the Councilmember's position with the Foundation is not a disqualifying economic interest for him under California Government Code section 87103. Additionally, from the facts presented, it does not appear that Councilmember Blair has any other economic interests which would potentially be affected by the decisions on the project. Therefore, he is not disqualified under the Act from participating in discussions and voting on Item 334.

## II. Government Code section 1090

Government Code section 1090 precludes a public officer or employee from participating in the making of a contract in which he or she is financially interested. Although the term "financial interest" is not specifically defined in the statute, an examination of case law and the statutory exceptions to the prohibition indicate that the term is to be very liberally construed. *Thomson v. Call*, 38 Cal. 3d 633,644-55 (1985).

Councilmember Blair's interest in the NTC project, if any, stems from his involvement as Vice Chair of the nonprofit NTC Cultural Foundation. Government Code section 1091.5(a)(7) provides that holding a position as a member of a nonprofit corporation is not a disqualifying interest for purposes of Government Code section 1090, provided that the interest is disclosed to the decision-making body at the time of the first consideration of the contract, and provided that the interest is noted for the record.

Although it does not appear from the docket description that the action items associated with Item 334 involve the immediate making of a contract, the action items are at the very least associated with the City's and the developer's ability to make future contracts regarding this project. Therefore, in an abundance of caution, we recommend that Councilmember Blair disclose

on the record his position with NTC Cultural Foundation prior to participating in or voting on Item 334.

III. Council Policy 000-4

San Diego City Council Policy 000-4 states in pertinent part:

No elected official, officer, appointee or employee of the City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

Under this policy, it is within a Councilmember's discretion to determine if a personal interest in a matter makes participation in a decision on that matter "incompatible with the proper discharge of his official duties" or would "tend to impair his independence or judgment or action . . . ." If the Councilmember determines that his participation in Item 334 would be inappropriate under Council Policy 000-4, he may choose to abstain from participating in the item. It should be emphasized however, that this result is not required under the law, and that Council Policy 000-4 is a policy which does not have the force and effect of law.

**CONCLUSION**

From the above analysis, Councilmember Blair's participation in the discussion and votes on Item 334, involving the NTC Reuse Plan, does not present a conflict of interest. Other issues which may arise in the future regarding the NTC Reuse Plan will have to be analyzed on a case-by-case basis, particularly if the facts regarding the Councilmember's economic interests change in relation to the NTC project. If you have any further questions, please feel free to contact me.

CASEY GWINN, City Attorney

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By

Lisa A. Foster  
Deputy City Attorney

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cc: Rick Duvernay, Deputy City Attorney

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